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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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12 BASALITE CONCRETE PRODUCTS,
13 LLC, a Nevada Limited
Liability Company,

NO. CIV. 2:10-2814 WBS KJN

14 Plaintiff,

ORDER RE: EVIDENTIARY HEARING

15 v.

16 KEYSTONE RETAINING WALL
17 SYSTEMS, INC, a Minnesota
Corporation,

18 Defendant.
19 _____/

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21 Plaintiff Basalite Concrete Products, LLC, filed this
22 action against defendant Keystone Retaining Wall Systems, Inc.,
23 arising from a contract granting plaintiff the right to
24 manufacture and sell defendant's retaining wall system blocks.
25 Defendant moves to dismiss for improper venue pursuant to Federal
26 Rule of Civil Procedure 12(b)(3) or 28 U.S.C. § 1406(a) because
27 of a forum selection clause designating Hennepin County,
28 Minnesota, as the proper forum or to dismiss pursuant to the

1 first-to-file rule because of a previously filed action in the
2 United States District Court for the District of Minnesota. In
3 the alternative, defendant moves to transfer the action to the
4 District of Minnesota pursuant to § 1406(a). (Docket No. 13.)

5 The court heard oral arguments on the motions on
6 December 6, 2010. Plaintiff argues that enforcement of the forum
7 selection clause would violate the public policy of California
8 because California law voids forum selection clauses in franchise
9 agreements and could cause a court in another state to apply law
10 contrary to California's franchise law. See Jones v. GNC
11 Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000) (holding
12 that the forum selection clause in a California franchise
13 agreement was unenforceable under federal law because of
14 California's strong public policy against forum selection clauses
15 in franchise agreements); see also Cal. Bus. & Prof. Code §
16 20040.5 ("A provision in a franchise agreement restricting venue
17 to a forum outside this state is void with respect to any claim
18 arising under or relating to a franchise agreement involving a
19 franchise business operating within this state.").

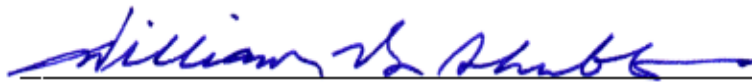
20 Because plaintiff's argument depends on the disputed
21 fact of whether the parties entered into a "franchise agreement"
22 under California law, the court will hold a evidentiary hearing
23 on **March 8, 2011, at 9:00 a.m.**, Courtroom No. 5 to determine
24 whether the parties' contract was a franchise agreement. See
25 Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1139 (9th Cir.
26 2004) ("To resolve such motions when genuine factual issues are
27 raised, it may be appropriate for the district court to hold a
28 Rule 12(b)(3) motion in abeyance until the district court holds

1 an evidentiary hearing on the disputed facts.").

2 At the hearing, the court will consider oral testimony,
3 exhibits, and affidavits. Cf. Pendergest-Holt v. Certain
4 Underwriters at Lloyd's of London & Arch Specialty Ins., Civil
5 Action No. H-09-3712, 2010 WL 3359528, at *4 (S.D. Tex. Aug. 23,
6 2010) ("The Court agrees that typically the rules of evidence are
7 relaxed in the bench trial and/or preliminary injunction setting.
8 . . . The Court, however, applies the rules of evidence as they
9 are intended, namely, to permit only reliable information into
10 the record . . . ").

11 IT IS THEREFORE ORDERED that an evidentiary hearing
12 will be held on March 8, 2011, at 9:00 a.m. in Courtroom No. 5 to
13 determine whether the contract between the parties was a
14 franchise agreement under California law and thus whether the
15 forum selection clause is enforceable.

16 DATED: December 17, 2010

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19 WILLIAM B. SHUBB
20 UNITED STATES DISTRICT JUDGE
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